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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 344

THE UNITED STATES OF AMERICA PETITIONER,

vs.

WARREN V. MOORE AND MRS WARREN V. MOORE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1950.

CERTIORARI GRANTED NOVEMBER 27, 1950.

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted]

In the District Court of the United States, for the Northern District of Texas, Dallas Division

Civil Action No. 3678

UNITED STATES OF AMERICA, PLAINTIFF

vs.

WARREN V. MOORE, ET UX, MRS. WARREN V. MOORE, 620 NORTH MARSALIS, DALLAS, TEXAS, DEFENDANTS

COMPLAINT—Filed June 29, 1949

1. Jurisdiction is conferred upon the Court by Sections 205, 206(b) and 206(c) of the Housing and Rent Act of 1947, as amended,
2 (50 U. S. C. Appendix 1881-1902, Public Law 31, 81st Congress, 1st Session), hereinafter referred to as the Act.

2. The Defendant, whether one or more, as shown in the style of this case, has demanded and received rent for the use and occupancy of the housing accommodations described in Schedule A, attached hereto and made a part hereof as though fully written herein, which housing accommodations are within the defense-rental area designated in Schedule A.

3. At all times mentioned herein, the housing accommodations set forth in Schedule A were subject to the Act and the Controlled Housing Rent Regulation (14 F. R. 1570), as amended, issued pursuant thereto.

4. During the period(s) set forth and on the occasion(s) stated in Schedule A, the Defendant has demanded, accepted, and received rent from the tenant, whether one or more, in the amount set forth on Schedule A for the housing accommodations therein described.

5. At all times material hereto, the maximum legal rents applicable to the housing accommodations were as set forth in Schedule A.

6. In the judgment of the Housing Expediter, the Defendant has engaged in acts and practices set forth in Schedule A which constitute violations of Sections 204 and 206 of the Act, and in view of the violations herein alleged the Defendant will continue to violate said Act by demanding, accepting, and receiving rents in excess of the maximum legal rent on all housing accommodations owned or operated by the Defendant unless enjoined and restrained by the Court.

3 7. That pursuant to Section 205 of the Housing and Rent Act, as amended, damages of three times the amount of the

overcharges occurring within the year preceding the filing of this cause of action have accrued to the persons from whom the overcharges were demanded, accepted, or received by the Defendant; that thirty days have elapsed since the occurrence of the violations alleged, the tenants herein have not brought suit for recovery of the overcharges, and pursuant to the said Section of said Act, the United States of America now asserts its claim for the said damages.

Wherefore, Plaintiff prays:

1. That Plaintiff have judgment against the Defendant for three times all overcharges made, demanded, collected, accepted, or received within one year preceding the filing of this suit.

2. That the Defendant be ordered and directed to pay to the Treasurer of the United States for and on behalf of all persons entitled thereto, all rents collected or received in excess of the maximum legal rents, or in the alternative, that such be paid to the Treasurer of the United States. That in the event the Court grants restitution to the United States for and on behalf of persons entitled thereto, that portion of the overcharges ordered restored for violations occurring within the one year period immediately preceding the filing of this suit for which the Plaintiff prays treble damages is hereby waived, and may be deducted from the treble damages adjudged to the United States of America.

3. That the Court issue without notice a temporary restraining order, and after due notice to the Defendant, a preliminary
4 injunction, and upon final trial of this cause, a final injunction, restraining the Defendant, Defendant's agents, servants, employees, and all persons acting in concert or participation with any of them, from directly or indirectly soliciting, demanding, accepting, or receiving any rent on all controlled housing accommodations owned, operated, or managed by Defendant in excess of the maximum legal rent, or from otherwise violating the Housing and Rent Act of 1947, as heretofore or hereafter amended or superseded, and the Regulations issued pursuant thereto.

4. For costs of this action and such other relief as the Plaintiff may be entitled.

LOWELL D. GIBBONS,
Attorney, Office of the Housing Expediter.

Office of the Housing Expediter,
Regional Office,
422 Fidelity Building,
Dallas 2, Texas.

SCHEDULE "A" TO COMPLAINT

5 Defense-Rental Area: Dallas, Texas

RENTAL UNIT (Address and Identification)	Tenant's Name	Rented by Tenant		Amount Rent Paid Per Month	Maximum Legal Rent		Overcharges		
		From	To		Amount per Month	How Determined	Per Mo.	Number	Total Overcharges
618 North Marsalis Street Upper North Apartment Dallas, Texas	J. R. Qualls	10- 1-47	2- 1-48	$75.00	$18.00	Registration	$57.00	4	$228.00
618 North Marsalis Street Upper North Apartment Dallas, Texas	J. R. Qualls	2- 1-48	10-31-48	75.00	18.72	Registration plus 4%	56.28	9	506.52
618 North Marsalis Street Upper North Apartment Dallas, Texas	J. R. Qualls	10-31-48	5-31-49	70.00	18.72	Registration plus 4%	51.28	7	358.96
									$1,093.48

Amount of overcharges subject to Restitution	Amount of overcharges subject to Treble Damages	Treble Damages	Double Damages	Single Damages
$1,093.48	$527.80	$1,583.40	$1,055.60	$527.80

6 IN UNITED STATES DISTRICT COURT

ORIGINAL ANSWER—Filed Aug. 4, 1949

To the said Honorable Court:

Now comes Warren V. Moore and wife, Mrs. Warren V. Moore, defendants in the above entitled and numbered cause, and in answer to the allegations in the complaint filed herein, represent to the Court:

1

Defendants deny allegations in Section 4 of the complaint, and that they have collected or received the rent for the dates and in the amounts and from the tenant as stated in Schedule "A" of said complaint.

2

Defendants would further show that the amount of rentals as collected from the tenant, J. R. Qualls as evidenced by his checks which he holds as receipts therefor was the sum of $22.00 per month during such term, that said tenant, J. R. Qualls paid said sum voluntarily and insisted upon paying the same with full knowledge of the fact that the claimed registration of the housing accommodations was at the rate of $18.00 per month, and that the said defendants have tendered and offered to the said J. R. Qualls and to the office of the Housing Expediter said excess payment, and that they are now ready, able and willing to make such refund and should not be held liable for triple damages or any costs of Court herein.

7 Wherefore, said defendants pray that they be discharged without day and recover all costs in this behalf expended.

COX & CUSACK,
By FRANK CUSACK,
Attorney for Said Defendants.

322 W. Jefferson, W-9134,
Dallas, Texas.

A copy of this answer has this 3rd day of August, 1949, been served upon Lowell G. Gibbons, plaintiff's Attorney, whose address is 422 Fidelity Building, Dallas 2, Texas, by mailing a copy thereof by United States Mail, postage paid.

In United States District Court

MOTION TO DISMISS—Filed Aug. 16, 1949

Now comes Warren V. Moore and wife, Mrs. Warren V. Moore, defendants in the above entitled and numbered cause and move the

Court to dismiss the complaint against them herein for the reason that the same fails to state a claim upon which relief can be granted in that:

(a) Said complaint is based upon the provisions of the Housing and Rent Act of 1947 as amended and particularly Section 205 thereof:

(b) That said complaint shows upon its face that all matters involved therein arose under the provisions of said Act and no
8 part thereof arose under the provisions of Price Control Extension Act of 1946 or the Emergency Price Control Act of 1942;

(c) That said petition shows on its face that no part of the provisions of Title One, Housing and Rent Act of 1947 as amended or the Housing and Rent Act of 1949 are applicable thereto, but that said complaint is based wholly and solely upon the provisions of Title Two of said Acts;

(d) That pursuant to the provisions of Sub-Section "3" of Sub-Paragraph "J" of Section 204 of the Housing and Rent Act of 1949, Chapter 42, Public Law 32, the provisions of said Title Two of the Housing Act and Rent Act of 1947 and 1949, had been terminated by the Housing Expediter prior to the filing of this complaint pursuant to a resolution adopted by the governing body of the City of Dallas and approved by the Governor of the State of Texas as provided in said section;

(e) That the termination of said Title had the legal effect of terminating the savings clause in sub-paragraph "F" of said Section 204 and this complaint being based solely upon the provisions of said Title Two of said Act and no matters covered by said Title One are involved, the savings clause therein has no application hereto and all matters involved in said complaint having arisen subsequent to the termination of the Emergency Price Control Act of 1942 as extended, no savings clause therein could operate as a saving to this action.

In the alternative defendants move to dismiss all of that part of said complaint wherein damages, triple or otherwise are sought to be recovered for violations occurring prior to June 30, 1948, for the
9 reason that said complaint fails to state a claim upon which relief can be granted in that the only right of action vested in the United States is that provided in Section 204 of the Housing and Rent Act of 1949 amending Section 205 of the Housing and Rent Act of 1947 and the only permission therein granted to the United States is to institute such action within a one year period subsequent to the alleged violation.

Wherefore, premises considered, defendants and each of them, pray that the complaint be dismissed in the alternative that the com-

plaint insofar as it seeks damages for alleged violations occurring prior to June 30, 1948, be dismissed.

COX & CUSACK,
By FRANK CUSACK,
Attorneys for Defendants.

322 W. Jefferson, W-9134,
Dallas, Texas.

A copy of this motion has been served upon the plaintiff by mailing the same to the Honorable Lowell D. Gibbons, Attorney, Office of the Housing Expediter, 422 Fidelity Building, Dallas, Texas.

In United States District Court

ORDER DENYING MOTION TO DISMISS

The above entitled and numbered cause came on to be heard on the motion of the defendants, Warren V. Moore, et ux, Mrs. Warren V. Moore to dismiss the complaint for the reason that it failed to state grounds upon which relief could be granted, and the Court having considered the same, is of the opinion that it should be denied.

It is ordered this 22 day of August, 1949, that said motion be and hereby is denied, to which ruling the defendants except.

WM. H. ATWELL,
United States District Judge.

In the District Court of the United States, for the Northern District of Texas, Dallas Division

Civil Action No. 3678

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

WARREN V. MOORE, ET UX, MRS. WARREN V. MOORE, 620 NORTH MARSALIS, DALLAS, TEXAS, DEFENDANTS

JUDGMENT

On this 17th day of September, 1949 came on for trial the above styled and numbered cause of action. Plaintiff appeared through its attorney, Lowell D. Gibbons and the Defendants appeared through their attorney, Frank Cusack; whereupon the Court proceeded to try the issues involved herein, and from the evidence adduced, finds that the Defendants collected rent in excess of the maximum legal rent, and judgment should be entered requiring the said Defend-

ants to make restitution to J. R. Qualls in the amount of $1,093.48, and that judgment should be entered for and on behalf of the United States for $50.00.

It is therefore Ordered, Adjudged, and Decreed that the Defendants Warren V. Moore and Mrs. Warren V. Moore, be, and they are hereby, ordered to make restitution to J. R. Qualls through the Office of the Housing Expediter, 321 Old Customs House Building, St. Louis, Missouri.

11 It is further Ordered, Adjudged, and Decreed that the Plaintiff have judgment for and recover from the Defendants, Warren V. Moore and Mrs. Warren V. Moore, $50.00; and that the costs of this action be taxed against the Defendant, for which let execution issue.

Entered this 3 day of Oct., A. D., 1949.

WM. H. ATWELL,
United States District Judge.

Approved as to Form:

LOWELL D. GIBBONS,
Attorney for Plaintiff.
FRANK CUSACK,
Attorney for Defendant.

In United States District Court

[Title omitted]

NOTICE OF APPEAL—Filed October 28, 1949

Now comes Warren V. Moore and Mrs. Warren V. Moore, defendants in the above entitled and numbered cause and files this, their notice of appeal to the United States Court of Appeals
12 for the Fifth Circuit from the final judgment rendered herein against them directing restitution to J. R. Qualls in the amount of $1,093.48 and in favor of the United States in the sum of $50.00, together with all costs.

FRANK CUSACK,
of
COX & CUSACK,
Attorney for Defendants.

322 West Jefferson, W-9134,
Dallas, Texas.

In United States District Court

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Northern District of Texas, Dallas:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Fifth Circuit with reference to the notice of appeal heretofore filed by the defendants in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

(1) Complaint

(2) Answer

(3) Defendant's Motion to Dismiss Complaint

(4) Order Denying Defendants' Motion to Dismiss Complaint

13 (5) Final Judgment

(6) Notice of Appeal together with the date of filing thereof.

(7) This Designation of Record

(8) The Reporter's transcript of the evidence of the witness, Lowell D. Gibbons as the same appears on Pages 4 to 8 of the Reporter's transcript of the evidence, two copies of which is filed herewith.

(9) The Court's oral opinion, Reporter's transcript Pages 22 to 24.

(10) Points of Appeal.

FRANK CUSACK
of
COX & CUSACK,
Attorney for Appellants.

322 West Jefferson, W-9134,
Dallas, Texas.

In United States District Court

Excerpt from Statement of Evidence

Lowell D. Gibbons, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

Mr. Gibbons:

I am Lowell D. Gibbons, attorney for the Office of Housing Expediter, Dallas, Texas, and as such I am custodian of the
14 records pertaining to the property at 614 North Marsalis, Upper North Apartment, Dallas, Texas. I have the file showing the maximum legal rent, which was from October 1, 1947 to February 1, 1948, $18.00.

Mr. Cusack:

We object to his statement and conclusion that it was eighteen dollars, and that the document or the instrument or the method by which that was fixed and determined is the best evidence.

The Court:

That is what he has before him. Overrule the objection. It is a way to get it in, of course, in a hurry; of course, you can look at it. Go ahead, Mr. Gibbons.

Mr. Gibbons:

That from February 1, 1948 until the expiration of the rent control, in Dallas, Texas, the maximum rent was $18.72 per month, the 72 cents being four per cent increase that was granted by the expediter.

Mr. Cusack:

If the Court please, the defendant at this time objects to the testimony as to the maximum rent control and ceiling price on the property as testified to by—

The Court:

All right, you can have your exception. Any cross examination?

Mr. Cusack:

Your Honor, this is very material in this case, and I would like to state my objections, if the Court may permit me.

15 The Court:

Overrule those objections, counsel; you may put it in your bill, if you have an objection.

Mr. Cusack:

The property, Your Honor, is not the property involved in the suit.

The Court:

I said go on, now, with your examination.

Mr. Cusack:

All right.

Cross-examination.

By Mr. Cusack:

Q. Mr. Gibbons, the registration certificate that you have testified from is for 618 North Marsalis, is it not?

A. That is correct.

Q. It does not state what property at 618 North Marsalis is the housing accommodation involved, does it?

A. That is correct, our files reveal there was only one accommodation at that address.

Q. The registration certificate does not identify the property as the upper north apartment at that address, does it?

A. It does not; it does not.

Q. It is not executed by the defendants in this case, is it?

A. It was executed by the former owner, Mrs. S. H. Chiles, C-h-i-l-e-s (spelling), is the way you spell it.

Q. And does not state the number of rooms in the accommodation?

A. No.

16 Q. It is not dated?

A. I haven't checked on that, it is not dated, that is right.

Q. You can't tell from your own knowledge whether it was filed during this time, or prior to this time, or subsequent to this time, can you?

A. The regulations in effect at the time that this was filed there, in November and December of 1942, at the regular filing time, was that they were undated if they were filed during the regular period for filing; if they were filed late, it is dated.

Q. Do you know of your own knowledge, or does your record disclose a filing date of this registration?

A. It does not.

Q. And you don't know of your own knowledge?

A. I do not.

Q. And you can't tell this Court whether or not it was filed before or after the dates involved in this suit, can you, from your own knowledge?

A. No.

Q. Not from your file?
A. No, sir.

Mr. Cusack:
Your Honor, we move to strike the testimony.

The Court:
Overrule your motion.

Mr. Cusack:
Note our exception.

The Court:
Mr. Gibbons, you testified six——

A. Eighteen.

17 The Court:
614—you mean 618, do you?

A. Yes, I have both here, this is the one he handed back.

The Court:
No, I am asking you what you said in your testimony, 614.

A. It should be 618.

The Court:
It should be 618?

A. Yes, sir.

The Court:
That was a lapsus linguae?

A. Yes, sir.

The Court:
All right, call your next witness.

* * * * * * * *

In the United States District Court

COURT'S ORAL OPINION

September 17, 1949

The Court:
The Court is bounden to require the Plaintiff that it make out its case by a preponderance of the testimony. That rule has
18 been satisfied here. Mr. Quarls was the renter. Mr. Moore was the landlord. The dates are all right, as set out and in

appendix, Schedule A to the Plaintiff's petition, and, the records to which Mr. Gibbons referred here, and which he has in his official possession, relate to a property at 618 North Marsalis; that there were more apartments than one there is quite immaterial to the inquiry here.

Mr. Quarls was a tenant in an apartment at 618 Marsalis. He testifies to the manner in which he got in touch with the owner of that apartment who had advertised, not in his own name, but under another name, and, who, when Mr. Quarles called him, made the appointment, and, when he reached the place, he found Mr. Moore, and, the arrangement was made first for $75.00 a month, which was subsequently reduced, by agreement of the parties, and, at the request of the tenant, to $70.00 per month. Each of those amounts were paid by $22.00 checks, and the remainder in cash, both when 75, and when it was 70.

Those facts I find to be facts, established by a preponderance of the testimony.

Now, as to the matter of damages, gentlemen, the total amount of these over-collections is properly alleged, to-wit, $1,093.48.

There is some evidence here of wilfulness, which might justify the Court in imposing double or treble damages, in accordance with the provisions of the law. The repairs that the landlord claims to have made, though he does not come here to so advise the Court, were repairs after other tenants had resided there. That fact is proven by what the landlord himself said to Mr. Quarles, about those who had roomed there before as tenants; likewise, mail came addressed in that box to other parties whom the Court may presume, from such testimony, had previously used those premises as
19 tenants, but I do not presume that, I merely call attention to that as what Mr. Quarles testified about.

The testimony of Mr. Quarles, and, his wife, is quite satisfactory, and, no one could hear them testify without knowing, feeling they were testifying to the truth.

Judgment in this case may go for $1,153.58, which is neither double nor treble, but which does cover a penalty of $50.00.

I ask you to draw the judgment, Mr. Gibbons, if you will, please.

Mr. Gibbons:

Yes, Your Honor.

The Court:

To be okayed by the other side as to form.

In United States District Court

APPELLANTS' STATEMENT OF POINTS ON APPEAL

The defendants, Warren V. Moore and Mrs. Warren V. Moore set forth the following points on which they intend to rely on appeal:

(1) The Court erred in denying defendants' motion to dismiss the complaint.

(2) The Court erred in admitting in evidence over defendants' objection the testimony of the witness, Gibbons, concerning the maximum legal rental on the accommodations involved.

20 (3) The Court erred in overruling defendants' motion to strike the testimony of the witness, Gibbons, concerning the maximum legal rentals on the accommodations involved herein.

FRANK CUSACK,
of
COX & CUSACK,
Attorneys for Defendants.

322 West Jefferson, W-9134,
Dallas, Texas.

21-22 Clerk's Certificate to foregoing transcript omitted in printing.

23 IN UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

CERTIFICATE OF CLERK, U. S. DISTRICT COURT AS TO CORRECTION IN RECORD—Filed January 16, 1950

UNITED STATES OF AMERICA,
Northern District of Texas, ss:

I, George W. Parker, Clerk of the United States District Court for the Northern District of Texas do hereby certify that the original complaint was filed June 29, 1949, in cause No. 3678 Civil, styled United States of America versus Warren V. Moore and wife.

Witness my hand and the seal of said court at Dallas, Texas, this 12th day of January, 1950.

[SEAL.]

GEORGE W. PARKER, Clerk,
U. S. District Court,
Northern District of Texas.
By (Signed) RAMELLE HAMILTON,
Deputy.

In the United States Court of Appeals for the Fifth Circuit

ARGUMENT AND SOBMISSION

Extract from the Minutes of April 19, 1950.

No. 13031

WARREN V. MOORE AND MRS. WARREN V. MOORE

versus

UNITED STATES OF AMERICA

On this day this cause was called, and after argument by Frank Cusack, Esq., for appellants, and Francis X. Riley, Esq., Special Litigation Attorney, Office of the Housing Expediter, for appellee, was submitted to the Court.

 IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13031

WARREN V. MOORE AND MRS. WARREN V. MOORE, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Northern District of Texas

Before HOLMES, WALLER and BORAH, Circuit Judges

OPINION OF THE COURT—Filed May 17, 1950

WALLER, *Circuit Judge:*

The United States, through the Housing Expediter, brought this action on June 29, 1949, for damages, injunction against further violation, and for restitution of rent overcharges, pursuant to Sections 205, 206 (a), and 206 (b), of the Housing and Rent Act of 1947, as amended [50 U. S. C. A. 1881, et seq.]. However, prior to the filing of this suit, the Housing Expediter, in conformity with action taken by the City of Dallas under Section 204 (j) (3) of the Act, had terminated rent control in that city. Based upon such abolition of rent control, Appellants moved to dismiss the suit. The motion was denied without opinion and the case pro-

ceeded to trial with the result that judgment was entered requiring the Defendants to make restitution to tenant J. R. Qualls in the amount of $1093.48, and to pay the United States the minimum sum of $50.00. The Court below, doubtless, declined to dismiss the action because of the saving clause of the Emergency Price Control Act of 1942 [50 U. S. C. A., Sec. 901], or the general saving clause [1 U. S. C. A., Sec. 109], as construed by this Court in *United States* v. *Carter*, 171 F. 2d 530.

It seems clear that any suit at law for damages, to the extent not barred by the one-year statute of limitations, that had accrued prior to the decontrolling of Dallas might still be enforced for such damages notwithstanding the termination of control. But whether rights of action for injunction and restitution were kept alive requires consideration of the function of an injunction suit and the relation of restitution to such injunction suit.

It was conceded in oral argument, as, indeed, it must be here, that a right to an injunction to prevent future violations of the Rent Control Act cannot be maintained when rent control has been terminated according to law, as in Dallas. It follows, therefore, that the Plaintiff, at the time of the filing of this suit, had no valid, surviving cause of action in equity for injunction after the termination of rent control. Consequently the Court below should have dismissed so much of the Plaintiff's suit as sought injunction, as well as its prayer for restitution if restitution is merely an incident to the equity suit for injunction.

There seems to have emerged out of the case of *Porter* v. *Warner Holding Company*, 328 U. S. 395, a notion that restitution is in and of itself a cause of action, of which equity has jurisdiction. This is a misconception of the nature of restitution. It is now, and always has been, a type of *relief* afforded as an incident to suits at law as well as in equity, but which equity had no jurisdiction to grant unless it had acquired jurisdiction of a cause in equity involving a primary right under equitable principles. However, if equity has such jurisdiction of the primary cause of action, it can, and will, grant complete relief by ordering restitution when appropriate to the doing of full justice.

In other words, restitution is ancillary, auxiliary, incidental, or adjunctive to a cause of action of which equity has jurisdiction. It is elementary that equity does not take jurisdiction where there is an adequate remedy at law,[1] and that equity does not have

[1] Equity ordinarily does not have jurisdiction of a purely legal demand. However, it may order restitution of a specific thing or chattel, or for the establishment of a lien. Remedy in equity not available where adequate remedy at law. See "Restatement of the Law of Restitution", page 4.

jurisdiction to grant judgment for the payment of money except as an incident to a case of equitable cognizance in order that complete and full justice may be done. For instance, in a suit for rescission the Court may direct that the defendant restore the specific property of the plaintiff or, in the event the specific property has been damaged or disposed of, then to return its equivalent in money. Restitution is not only an adjunct of an equitable cause of action, but it is a form of relief commonly granted in suits of
26 law, such as replevin, or even in tort actions,[2] trover or ejectment, but, historically, there is no such thing as an action of restitution for a money judgment either in law or equity.[3]

But all of this was made quite clear by the decision in *Porter* v. *Warner Holding Company, supra.* There the Court said:

> "It is readily apparent from the foregoing that a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court *once its equity jurisdiction has been invoked under* § 205 (a). * * * It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant 'a permanent or temporary injunction, restraining order, or other order.' * * * An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:
>
> "(1) *It may be considered as an equitable adjunct to an injunction decree.* * * * To be sure, *such a recovery could*

---

[1] The most complete and comprehensive test to the existence of equity jurisdiction is this formula: Equity jurisdiction extends to and embraces all civil cases, and none others, in which there is not a full, adequate, and complete remedy at law. See: *Grand Chute* v. *Winegar*, 15 Wall. 373; *Ins. Co.* v. *Bailey*, 13 Wall. 616; *Hipp, et al.* v. *Babin, et al.*, 19 How. 271; *Parker* v. *Winnipiseogee Lake Cotton and Woolen Co.*, 2 Black 545.

[2] Restitutionary relief may be awarded in tort actions such as replevin, ejectment, and trover. See "Restatement of the Law of Restitution", pp. 522-523.

[3] A claim to a restitutionary right is not a ground of equitable jurisdiction. In order to be entitled to recover money by way of restitution in an equity action there must also exist grounds for invoking the jurisdiction of equity. Restatement of the Law of Restitution, pp. 1-2.

not be obtained through an independent suit in equity if an adequate legal remedy were available. [Citing cases.] *But where,* as here, *the equitable jurisdiction of the court has properly been invoked for injunctive purposes,* the court has the power to decide all relevant matters in dispute *and to award complete relief* even though the decree includes that which might be conferred by a court of law. * * *

"(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. * * * *Future compliance* may be more definitely assured if one is compelled to restore one's illegal gains; * * *

"The legislative background of § 205 (a) confirms our conclusion that the traditional equity powers of a court remain unimpaired in a proceeding under that section so that an order of restitution may be made. * * *

"* * * To the extent that damages might be properly awarded in a court of equity in the exercise of its jurisdiction under § 205 (a), * * * § 205 (c) supersedes that possibility and provides an exclusive remedy relative to damages. It establishes the *sole means* whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the nature of penalties. *Moreover, a court giving relief under* § 205 (c) *acts as a court of law rather than as a court of equity.* * * * (Emphasis added.)

By the termination of rent control in Dallas the Expediter was shorn of all power to enforce such control in the future; that is to say, no longer was there a right to an injunction to prevent violations and to enforce control in an area that had lawfully been decontrolled. Restitution, being, as Mr. Justice Murphy held, "an equitable adjunct to an injunction decree" or "other order" which the Court could enter to aid in bringing about enforcement of the Act, was neither appropriate nor issuable when there was no longer any control to violate or violations to enjoin, and hence there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive. A right to enforce by injunction a control that has expired is certainly not within the saving clause of either of the statutes.

This leaves the Expediter solely with a right of action for the recovery of overcharges that have occurred within one year from the bringing of the suit, plus the damages which the statute permits in a suit at law.

This Court has held, in *Creedon* v. *Randolph*, 165 F. 2d 918, and in *Co-Efficient Foundation* v. *Woods*, 171 F. 2d 691, that the period of limitations provided under Section 205 (c) of the

Emergency Price Control Act was not applicable to an equitable action for injunction and restitution under the Act when such equitable action was not sought to enforce some purely legal right. But in the present case there is no right of action surviving for an injunction, and no other equitable action to which restitution could be an adjunct, with the result that under the legal action that survives decontrol the statute of limitations of one year is in full force and effect.

The only other question involved in the case is based upon the admission of oral testimony rather than the available record evidence as to the maximum rent allowable for the premises in question. Defendants objected on the ground that the record showing the maximum legal rental on the accommodations involved was the best evidence. This objection would have been good and sustainable had it not been for the fact that the Defendants, in Paragraph 2 of their answer, admitted the amount of the maximum rental, as well as the amount of the overcharges, and averred that they had tendered and offered to pay same to the tenant. In
28 the light of these admissions the lower Court was without error in overruling the objections of the Defendants. There was no burden on the Plaintiff to prove facts which the Defendants by their pleadings had theretofore fully admitted.

The cause is remanded with directions to dismiss the suit insofar as it seeks an injunction and restitution, and for a new trial for any overcharges, together with damages, as may have accrued within one year from the date of the filing of the complaint.

IN UNITED STATES COURT OF APPEALS

No. 13031

WARREN V. MOORE AND MRS. WARREN V. MOORE

versus

UNITED STATES OF AMERICA

JUDGMENT—Extract from the Minutes of May 17, 1950.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the suit insofar as it seeks an injunction and restitution, and for a new trial for any overcharges, together with damages, as may have accrued within one year from the date of the filing of the complaint.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed June 2, 1950

To the Honorable United States Court of Appeals for the Fifth Circuit:

Now come Warren V. Moore and Mrs. Warren V. Moore, appellants, and respectfully petition the Court for re-hearing of the appeal herein, basing such petition on the following grounds:

1

The holding of the Court that the admission of testimony concerning the maximum legal rent on the premises, was not error, by reason of the allegations contained in paragraph 2 of the defendants' answer,[1] is an erroneous construction of the record and places a different construction thereon to that given by the Court and the parties in the Trial Court.[2]

29

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[1]Defendants would further show that the amount of rentals as collected from the tenant, J. R. Qualls as evidenced by his checks which he holds as receipts therefor was the sum of $22.00 per month during such term, that said tenant, J. R. Qualls paid said sum voluntarily and insisted upon paying the same with full knowledge of the fact that the *claimed registration* of the housing accommodations was at the rate of $18.00 per month, and that the said defendants have tendered and offered to the said J. R. Qualls and to the office of the Housing Expediter said excess payment, and that they are now ready, able and willing to make such refund and should not be held liable for triple damages or any costs of Court herein. (R. p. 6) (Italics ours.)

[2]The construction placed on paragraph 2 of defendant's answer in the Trial Court by all of the parties, was only to the effect that the defendants recognize that the United States "claimed" a registration of the housing accommodations at $18.00 per month, and that the tenant voluntarily and without any wilfullness on the part of the defendants, paid the sum of $22.00 for which reasons, the defendants having theretofore tendered, and still tender any excess payment, they should not be held for triple damages or any costs. In the light of this construction in the Court below, this Court should not allow its opinion to stand, making the law of the case by holding such allegations to be an admission, relieving the plaintiff of the burden of proving a maximum legal rental.

2

The Court has erroneously established the law of the case in holding that the allegations in paragraph 2 of the defendants' answer, admitted a maximum legal rent, and such holding deprives the defendants of the liberal rule of construction of pleadings contemplated under Rule 8, Federal Rules of Civil Procedure, and abridges the right to inconsistent pleadings.[3]

30 3

The holding of this Court that the defendants in paragraph 2 of their answer, cured any error in the admission of the testimony as to maximum legal rental, if to become the law of this case, should be clarified as to the extent of the Court's holding, and such holding limited to the effect that such allegations are binding on the defendants in this appeal only, for that in the light of a new trial, such holding should not operate to abridge defendants' right under Rule 15, Federal Rules of Civil Procedure, to move for leave to amend so as to effect the ends of justice, as the sole issue on a new trial of this case is whether the housing accommo-

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[3] The construction placed by the Trial Court and by the parties in the Court below in paragraph 2 of the defendants' answer was merely to the effect of avoiding the charge of wilfulness. This is clearly borne out by the allegation itself "*Claimed Registration of the Housing Accommodation*", for it was never conceded or intended to admit that there was a registration or a maximum legal rental on the accommodation involved in this action. That the United States in the Court below did not consider paragraph 2 as an admission, is amply borne out from the record wherein they undertook to sustain the burden of proving a maximum legal rent. Outside of the record as presented in this Court, but within the record in the Court below, such construction is further sustained by the fact that after the service on the United States of the defendants' answer, the United States served request for admission, in which it was sought to have the defendants admit the registration and the maximum legal rental, which the defendants answered. The construction placed on paragraph 2 by this Court was raised for the first time by the United States in this Court in appellee's brief, page 23, where they wholly fail and neglect to give effect to the allegation "claimed registration", and such change in position should not be allowed to the prejudice of appellants on a new trial.

dations involved were controlled accommodations with a legal maximum rent.[4]

31 WHEREFORE, it is respectfully submitted that a rehearing should be granted to the extent herein above indicated.

(signed) FRANK CUSACK,
FRANK CUSACK of COX & CUSACK,
322 West Jefferson Y8-9134,
Dallas, Texas,
Counsel for Appellants.

The foregoing petition is believed to be well founded in point of law and has not been filed for the purposes of delay, and a copy hereof, has been served on counsel for appellee by mailing a copy thereof to Ed Dupree, General Counsel, Office of the Housing Expediter, Washington 25, D. C., this — day of —, 1950.

(Signed) FRANK CUSACK,
Attorneys for Appellants.

In the United States Court of Appeals for the Fifth Circuit

[Title omitted]

PETITION FOR REHEARING (APPELLEE)—Filed June 7, 1950

The House Expediter, appellee herein, respectfully requests that this Honorable Court grant a rehearing of the argument heretofore had before this Court (Holmes, Presiding Judge, Waller and Borah, Circuit Judges, sitting) in New Orleans, Louisiana, April 19, 1950. In conjunction with this petition, the Housing Expediter further requests that the printing of the opinion heretofore rendered by this

[4] It is very probable that this Court's opinion is susceptible of a construction that the law of the case has been established binding on these defendants on a new trial, depriving them of any right to ask the Trial Court for leave to amend prior to a new trial, in order to remove any question such as the Court has held on this appeal through the inadvertent choice of language of counsel in pleading. It will be remembered that in oral argument of this case, the appellants represented to this Court, and again represent to this Court that their earnest contention in the Court below, and here, is that the accommodations involved in this suit, were not controlled, and that the United States, without the holding herein establishing the law of the case, can never by legally competent evidence, establish those facts.

Court on May 17, 1950, be withheld pending the disposition of appellee's petition for a rehearing.[1]

Appellee's petition for rehearing is based upon the following grounds:

1. The ruling herein is contrary to its previous decision in *Creedon* v. *Randolph*, 165 F. 2d 918; it restates principles which it expunged upon rehearing in *Woods* v. *Selber*, 171 F. 2d 900;
32 and it is also inconsistent with *Jackson* v. *Woods*, decided by this Court on May 17, 1950.

2. This decision is also clearly at odds with the holding of the Supreme Court in *Porter* v. *Warner Holding Co.*, 328 U. S. 395.

3. It is likewise contrary to the conclusions reached by every other Federal Circuit Court which have had occasion to pass upon the question; of the Third, in *Woods* v. *Wolfe*, No. 10047, decided May 18, 1950; of the Fourth, in *Woods* v. *Wayne*, 177 F. 2d 559; of the Fifth, in *Creedon* v. *Randolph*, 165 F. 2d 918; of the Sixth, in *Bowles* v. *Skaggs*, 151 F. 2d 817, and in *Woods* v. *Witzke*, 174 F. 2d 855; of the Eighth in *Ebeling* v. *Woods*, 175 F. 2d 242; of the Ninth, in *Woods* v. *Richman*, 174 F. 2d 614, *Woods* v. *McCord*, 175 F. 2d 919, and *Woods* v. *Gochnour*, 177 F. 2d 964.

These grounds will be considered in order.

1. This Court in *Creedon* v. *Randolph*, 165 F. 2d 918, expressly overruled the District Court for the Southern District of Florida, which had held that a court of equity could not order restitution unless it had prior equity jurisdiction. The decision in the case at bar returns to that repudiated doctrine. In reversing the lower Court in the instant case this Court stated "* * * restitution is ancillary, auxiliary, incidental, or adjunctive to a cause of action of which equity has jurisdiction" (P. 3, Slip Opinion).

Having made that determination this Court dismissed the Expediter's action for restitution on the ground that "there remained no proceeding of which equity would have jurisdiction to which restitution could be adjunctive" (P. 6, Slip Opinion).

Let us examine the *Randolph* case in the light of this doctrine. The facts there were briefly as follows: The defendant, a resident of New Jersey, leased an apartment for the winter in Florida in 1944-45 (R. 8-9);[2] she sublet the apartment for the latter portion of the term (February 16, 1945 to May 1, 1945 (R. 8)) and returned to New Jersey (R. 10-11); Suit was filed on January 11,

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[1] And the decision in *Woods* v. *Jackson* (Nos. 12948 and 12955) decided May 17, 1950.

[2] The "R" references are to the record in the *Randolph* case on file in this Court, No. 12094, filed August 16, 1947.

1947, pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925 (a)) (R. 1); the sole prayer for relief was restitution of the overcharge. The prayer for relief did not include injunctive relief (R. 6).[3] The defendant defaulted (R. 6); upon proof the Expediter established the overcharge (R. 6-11); and the lower Court took the case under advisement (R. 11).

33 The Court subsequently filed a memorandum decision in which it decided against the Expediter (R. 11-12), and then entered a judgment in favor of defendant (R. 12). In its opinion[4] the District Court stated that the Expediter was not entitled to a judgment because: "Here no equitable relief is sought. The Act complained of was committed a long time ago and no threatened present or future violations of the Act are charged in the complaint. There is, therefore, no legal basis for this Court to exercise the 'traditional equity power' and in so doing order restitution of the alleged overcharge" (R. 12).

This Court reversed that ruling (Sibley, Presiding Judge, Holmes and Waller, Circuit Judges, sitting) because, "In this we think there was error" (165 F. 2d at 919). In its opinion this Court expressly rejected the necessity of the existence of injunctive jurisdiction as a condition precedent to ordering restitution. In this connection the Court said, at p. 919:

> Here the Administrator did not ask for a prohibitory injunction against future violations, and probably would not have gotten it if he had.

This Court then expressly held that restitution was a proper remedy in and of itself and emphatically repudiated the contention that restitution was dependent upon injunctive relief.

> It is a remedy which may be had *in addition* to the others set up in the Act, and an order of restitution may be granted with or *without a prohibitory injunction*" (165 F. 2d at p. 920). [Italics added.]

The foregoing language unequivocally conflicts with the following doctrine as stated in the case at bar:

> * * * equity does not have jurisdiction to grant judgment for the payment of money except as an incident to a case of equitable cognizance in order that complete and full justice must be done (P. 4, Slip Opinion).

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[3] This Court has considered restitution to be in the nature of a "mandatory injunction." *Creedon* v. *Randolph*, 165 F. 2d at p. 919.

[4] The memorandum decision is set forth in full, *infra*, p. 10.

The citation of *Creedon* v. *Randolph*, in the opinion in the instant case (P. 6) without specifically reversing it, creates an irreconcilable conflict of authority for the lower Courts and practitioners of this Circuit.

(a) In the case of *Woods* v. *Selber*, 171 F. 2d 900, this Court filed an opinion in which it stated that restitution was "incidental"
34 to injunctive relief. In that opinion (Case No. 12322) filed November 17, 1948, this Court stated (on page 9 of the Slip Opinion):

> In bringing the action under subsection (a) the complaint was likewise in conformity with the Act, as construed by the Supreme Court, in seeking (1) the equitable remedy of injunction and (2) the incidental relief by restitution of the overcharge to the tenant.

On January 18, 1949, in response to appellant's petition for a rehearing, the court deleted that language thereby bringing it into conformity with the previously expressed opinion of this Court in *Creedon* v. *Randolph*. The petition for rehearing of the Expediter in the *Selber* case was based upon the prior holdings of the Supreme Court and this Court as evidenced by the *Randolph* and the *Warner Holding Company cases* (see p. 5, petition for rehearing).

(b) Furthermore, the decision herein is inconsistent with the opinion filed the same day in *Jackson* v. *Woods* (No. 12948). On page 2 of the Slip Opinion of the *Jackson* case this Court upheld a judgment of restitution over appellant's objection on the ground that the right to "relief of restitution did not expire at the time of the filing of the suit." This language is contradictory to the *Moore* decision since it implies that although the suit was filed prior to the termination of rent control, a judgment for restitution would be possible after decontrol. Since the Expediter's right to prohibitive injunctive relief would have expired under the *Moore* doctrine with the termination of rent control, there would be no jurisdiction upon which to base the "incidental" relief of restitution.

2. The decision of the Court in this case is clearly at odds with the ruling of the Supreme Court in *Porter* v. *Warner Holding Company*, 328 U. S. 395. *The Warner Holding Company* case was accepted for consideration by the Supreme Court for the sole purpose of determining whether restitution was possible as a means of relief pursuant to Section 205 (a) of the Emergency Price Control Act (id. p. 397). The Supreme Court held that restitution was a proper remedy pursuant to said section on either of two possible theories: (1) "as an equitable adjunct to injunctive relief." (id. p. 399); *or* (2) "as an order appropriate and necessary to enforce compliance with the Act" (id. p. 400). If the opinion of this court

in the instant case means what it says, that is, that restitution is "ancillary, auxiliary, incidental, or adjunctive to a cause of action * * *" (P. 3, Slip Opinion), then the second basis for granting restitution under the *Warner Holding Company* case is totally meaningless. If the first ground referred to by the Supreme Court for granting restitution be "adjunctive" to an injunction then it must necessarily follow that the second alternative ground which includes no reference to the word "adjunct" means that restitution need not be "adjunctive" to injunctive relief. Any other interpretation of the opinion and the language of the Supreme Court would require part 2 of that decision to be disregarded as surplusage.

3. On page 2 above, we have listed six of the Federal Circuit Courts, including this one, which had previously passed upon this question and held contrary to the decision of this court. These Circuit Courts have unanimously followed the reasoning first set forth by this Court in the *Randolph* case, *supra*, and in almost every instance have cited that case as a controlling authority. The most recent decision is *Woods* v. *Wolfe* (No. 10047 (C. A. 3), decided May 18, 1950. In that opinion[5] which was issued by the Third Circuit "for the future guidance of the courts of this circuit,"[6] the court stated that injunction was one type of equitable relief possible and that restitution was another independent type of equitable relief possible pursuant to Section 205 (a) of the Price Control Act, and Section 206 (b) of the Housing and Rent Act under the doctrine as established in the *Warner Holding Company* case. Speaking for the Court, Chief Judge Biggs said:

> Congress made available to the Expediter through Section 205 (a) an armory of the weapons of equity. One of these weapons is the injunctive process; another is restitution. Neither one is dependent upon the other. Both may be availed of, or one or the other successfully employed.

This doctrine has similarly been expressed by the Fourth Circuit in *Woods* v. *Wayne*, 177 F. 2d 559 where Judge Soper speaking for the Court said:

> If it is shown that illegal exactions were made under either statute, the court has power to order restitution in this suit, even if upon further hearing the court may find that no restraining order as to the defendant's future conduct is necessary or proper. See *Creedon* v. *Randolph*, *supra*; *Woods* v. *McCord*, *supra* (177 F. 2d at 561).

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[5] The entire opinion appears in the Appendix, infra, pp. 11-15.

[6] *Infra*, p. 13.

36 *Conclusion*

For the foregoing reasons, it is respectfully submitted that appellee's application for rehearing be granted.

Respectfully submitted,

ED DUPREE,
General Counsel,
LEON J. LIBEU,
Assistant General Counsel,
FRANCIS X. RILEY,
Special Litigation Attorney,
Office of the Housing Expediter,
Washington 25, D. C.

Certificate of Attorney

There comes now Francis X. Riley, an attorney for the Office of the Housing Expediter, who certifies that he has read the opinion in the above entitled matter; that he knows the contents thereof, and that this petition is filed in good faith and not for the purposes of delay.

Special Litigation Attorney.

APPENDIX

MEMORANDUM DECISION

Early in 1945 the defendant rented certain premises in St. Petersburg, Florida, to one Mrs. Grace Meckenberg for a period of three months for the sum of $385.00. Plaintiff claims the legal rent for said premises during said period was $225.00 and that the tenant was overcharged in the amount of $160.00. Long after the statute of limitations had barred the right of the tenant or the Administrator to institute suit for recovery of the overcharge, under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, the Administrator brought this suit under Section 205 (a) of the Act, praying "That the defendant be ordered and directed to return to such persons as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Act and Regulations * * *". No other equitable relief is sought by the complainant.

Defendant filed no Answer or other pleading in this case and a Judgment by Default has been entered against her.

Plaintiff relies upon *Bowles* v. *Skaggs*, 151 Fed. 2d 817 and *Porter* v. *Warner Holding Company*, 328 U. S. 395 to support this unusual proceeding. The cases relied upon were suits by the Administrator invoking the equity jurisdiction of the Court to enjoin violation of

the Price Control Act, as authorized by Section 205 (a) of
37 said Act, and as the courts point out in these cases the power of the court to order restitution was based entirely upon the exercise of its general equity jurisdiction. Here no equitable relief is sought. The act complained of was committed long ago and no threatened present or future violations of the Act are charged in the complaint. There is, therefore, no legal basis for this court to exercise the "traditional equity powers" and in so doing order restitution of the alleged overcharge.

A judgment will be accordingly entered for the defendant.

Dated at Tampa, Florida, this 13th day of May 1947.

DOZIER A. DEVANE,
Judge, United States District Court.

OPINION OF THE COURT

(Filed May 18, 1950)

By BIGGS, *Chief Judge.*

This is a suit brought by the Housing Expediter (then Creedon, now Woods) against the defendants, the Wolfes, alleging that overcharges had been made in violation of Section 4 (a) of the Emergency Price Control Act of 1942, 50 U. S. C. A. App. § 904 (a), as amended. Jurisdiction in the court below was invoked pursuant to Sections 205 (a) and (e) of the Emergency Price Control Act, 50 U. S. C. A. App. §§ 925 (a) and (e); and Section 206 (b) of the Housing and Rent Act of 1947, 50 U. S. C. A. App. § 1896 (b), the latter Act having been enacted on July 1, 1947 to continue and maintain the maximum rentals prescribed pursuant to the Emergency Price Control Act.

The pertinent facts are as follows. The Wolfes own a house in Philadelphia. They rented a room to the Slavins from November 1[illegible], 1942 to December 12, 1946. The maximum legal rental for the room was $30.00 a month. The defendants charged $40.00 a month, $30.00 of which was paid by the Slavins by check, the balance, $10.00, being paid in cash. These facts were found by the court below on ample evidence. The court decided that violations had been committed by the defendants and ordered them to make restitution to the Slavins in the amount of $470.00, to be paid through the Office of the Housing Expediter. The trial judge also enjoined the defendants from soliciting or receiving rents in excess of the maximum legal rents permitted by the Housing and Rent Act of 1947 or the regulations promulgated thereunder. In connection with the injunctive relief granted by the court below, the learned trial judge found: "That, in view of the violations shown, it is reasonable to

believe that unless restrained the defendants will violate the
38 rent regulations when acting as landlords." The defendants have appealed.

The points raised by the defendants require no extended discussion. The Wolfes first assert that the court below erred in granting the injunction contending that no immediate need for such relief existed and that the injunctive process of the court below was in effect employed only to punish the defendants for their past misdeeds. In this connection the defendants emphasize the fact that the room which had been rented by them to the Slavins had been taken over by their son and that they were not acting as landlords at the time of the trial or at the time of the entry of the judgment complained of. The Wolfes allege, second, that the injunction served no public interests, that it merely provided "the basis for awarding money damages to the tenants."

We agree that an injunction may not be imposed on a defendant to punish him for his past misconduct or be employed merely as a basis for jurisdiction which otherwise would not exist. Such, however, was not the use of the injunction here. As we have indicated the Wolfes had increased the rental charge $10.00 a month for a period of 48 months, making use of a cash-check device as demonstrated by the evidence. There can be no question but that they possessed guilty knowledge and guilty intent. While the district judge refused to make a finding as requested by the defendants that the room was occupied by the defendants' son, he stated that he would assume nonetheless that the room was occupied by the son. We will assume, as did the court below, that this was the fact. The defendants therefore take no harm from the court's refusal to make the requested finding. On the merits we agree with the conclusion of the court below that because the defendants are presently in a position, perhaps temporarily, where they could not violate the law, it does not mean that they might not be quick to violate it again. A four-year-long period of prior deliberate misconduct requires a strong showing that the offending individuals are actually in *locus paenitentiae*. The Wolfes have made no such showing. Under the circumstances we cannot say that the court below abused its discretion in issuing the injunction. *Bowles* v. *Leithold*, 3 Cir., 155 F. 2d 124, 125.

Having so ruled it becomes unnecessary to discuss the second branch of the defendant's argument. For the future guidance of the courts of this circuit it is not out of place, however, to dispose of the contention involved. The Wolfes insist that Section 205 (a) of the Emergency Price Control Act will not support restitution unless the court possessed the jurisdiction to issue an injunction. Since, say the defendants, the court below was without jurisdiction to issue the injunction for the reasons asserted by the defendants

and already discussed in this opinion, the court cannot com-
39 pel restitution under Section 205 (a).[1] They construe *Porter* v. *Warner Co.*, 328 U. S. 395, and *Hecht Co.* v. *Bowles*, 321 U. S. 321, 328, in a way which would prohibit recovery by the Expediter. We agree with the defendants that the Porter decision is largely dispositive of this issue in the instant case but we cannot agree with the defendants' construction of that decision. The order of restitution in the instant case as in Porter "* * * may be considered as an order appropriate and necessary to enforce compliance with the Act." Mr. Justice Murphy went on to say, "Section 205 (a) anticipates orders of that character [viz., orders for restitution], although it makes no attempt to catalogue the infinite forms and variations which such orders might take." 328 U. S. at p. 400. The defendants insist that the sentence which follows the words last quoted, "The problem of formulating these orders has been left to the judicial process of adapting appropriate *equitable*[2] remedies to specific situations.", compels a decision of the issue in their favor. They say in effect that restitution is in the nature of a remedy at law and since the court was without jurisdiction to grant the equitable remedy of injunction, likewise it must be deemed to be without power to grant the remedy of restitution.

The answer to the contention is that the Supreme Court has held restitution to be a proper *equitable* remedy under Section 205 (a). See *Porter* v. *Warner Co.*, *supra*, and *Ebeling* v. *Woods*, 8 Cir., 175 F. 2d 242, 244. Congress made available to the Expediter through Section 205 (a) an armory of the weapons of equity. One of these weapons is the injunctive process; another is restitution. Neither one is dependent upon the other. Both may be availed of, or one or the other successfully employed. The defendants try to draw a sharp distinction between actions at law and actions in equity as exemplified respectively by Sections 205 (a) and 205 (e). It is true that Section 205 (e) might be described as a remedy "at law", and Section 205 (a) as supplying remedies "in equity" as distinguished from those "at law". But even if this unwitty diversity be insisted upon it remains clear that Congress could give, and the Su-

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[1] As a counterpart to this argument the Wolfes point out that Section 205 (e) of the Act, which provides a remedy for the collection of damages for over ceiling violations, requires that suits be instituted within one year of the violation; here the last violation took place on November 12, 1946, and suit was not instituted until August 28, 1947. Recovery under the section last cited would be based on overcharges made after August 28, 1946, and would include only three such overcharges. We agree with the defendants that recovery of damages under Section 205 (e) would be limited.

[2] Emphasis added.

preme Court has ruled that Congress has given, to the Ex-
40 pediter the remedies prescribed in Section 205 (a) including the remedy of restitution. The views expressed here are in accord with those of other courts. See *Woods* v. *Wayne*, 4 Cir., 177 F. 2d 559, 560; *Woods* v. *Witzke*, 6 Cir., 174 F. 2d 855, and the other cases cited by Judge Soper in the Wayne case.

The judgment appealed from will be affirmed.

A true copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARINGS

Extract from the Minutes of July 17, 1950

[Title omitted]

It is ordered by the Court that the petitions for rehearing filed in this cause be, and the same are hereby, denied.

Clerk's certificate to foregoing transcript omitted in printing.

41 SUPREME COURT OF THE UNITED STATES

No. 344—October Term, 1950

ORDER ALLOWING CERTIORARI—Filed November 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 819332 389